Nos. 64 and 85

In the Supreme Court of the United States.

October Term, 1960

Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, PETITIONER,

v.

The National Labor Relations Board

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v.

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ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

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OPINIONS BELOW

The opinion of the court of appeals (R. 63) is reported in 275 F. 2nd 646. The findings of fact, conclusions of law, and order of the Board (R. 37-47) are reported at 121 NLRB No. 205.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1960, and appears at R. 72, its decree at R. 73. Certiorari was granted on April 20, 1959 (R. 77). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U.S.C. 160(e).

QUESTIONS PRESENTED

1. Whether a union and an employer may by contract validly provide that casual employment shall be obtained by a worker solely upon referral from a nondiscriminatory dispatching service operated by the union if the contract does not explicitly incorporate the following three requirements formulated by the National Labor Relations Board: (1) selection of applicants for referral to jobs shall be on a nondiscriminatory basis, (2) the employer retains the right to reject any job applicant referred by the union, and (3) the parties to the agreement post notices of all the provisions relating to the functioning of the hiring arrangement.

2. Whether the operation of the dispatching service pursuant to a contract that does not contain the foregoing three requirements is a valid basis for an order by the National Labor Relations Board requiring the employer and the union jointly and severally to reimburse the casual employees for the union dues and initiation fees paid to the union by the employees for the period beginning six months preceding the filing and service of the unfair labor practice charge.

STATUTES INVOLVED

The pertinent provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. Section 151, et seq.), are Sections 7, 8(a)(1) and (3), 8(b)(1)(A), 8(b)(2):

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organiza-

tions, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7:

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .

Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: . . .

(2) to cause or attempt to cause an employer in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

STATEMENT

1. *The Facts*

There is no conflict respecting the applicable facts; this case presents primarily questions of law: the validity of the hiring or referral agreement on its face, and, if invalid, the validity of the Board order requiring reimbursement of dues and initiation fees to employees employed thereunder. The case arose in the following posture:

California Trucking Associations, Inc., an association of

motor truck operators, represents its employer members in collective bargaining with the unions who act for their employees (R. 55). About May 1, 1955, the Association entered into a collective bargaining contract, known as the Master Dry Freight Agreement, with the International Brotherhood of Teamsters and fifteen of its affiliated local unions, of which petitioned Local 357 is one (R. 55; 62-66). The Association executed this master agreement on behalf of about one thousand trucking firms of which Los Angeles — Seattle Motor Express, Inc., herein called the Company, is one (R. 55, 60). The agreement was for a three year term commencing May 1, 1955 (R. 55).

The agreement provided that, with respect to those employers who operated within the territorial jurisdiction of a local union which maintained a dispatching service, the employers were to hire *casual* employees solely through the dispatching service unless such workers were unavailable from that source (R. 37, 49, 56; 62-63). The agreement stated this requirement in the following terms (R. 62-63):

> Casual employees shall, wherever the Union maintains a dispatching service, be employed only on a seniority basis in the Industry whenever such senior employees are available. An available list with seniority status will be kept by the Unions, and employees requested will be dispatched upon call to any employer who is a party to this Agreement. Seniority rating of such employees shall begin with a minimum of three months service in the Industry, irrespective of whether such employee is or is not a member of the Union.
>
> Discharge of any employee by any employer shall be grounds for removal of any employee from seniority status. No casual employee shall be employed by any employer who is a party to this Agreement in violation of seniority status if such employees are available and if the dispatching service for such employees is available. The employer shall first call the Union or the dispatching hall designated by the Union for such help. In the event the employer is notified

that such help is not available, or in the event the employees called for do not appear for work at the time designated by the employer, the employer may hire from any other available source.

Lester H. Slater was a member in good standing of petitioner Local 357 (R. 49). For some two years he had secured casual employment through the dispatching service maintained by Local 357 (R. 55). However, on August 27, 1955, he obtained employment with the Company as a casual employee without clearance through the dispatching service (R. 49, 54-55). On November 10, 1955, upon learning that Slater had secured casual employment without referral from the dispatching service, an officer of Local 357 responsible for maintaining observance of the agreement requested the Company to cease employing Slater as a casual employee except on proper referral through the dispatching service (R. 39, 49-50, 55). The Company honored the request in accordance with its agreement (*ibid.*). The Company had originally hired Slater as a casual employee without referral from the dispatching service based on a misapprehension that Local 357 had authorized Slater to seek casual employment by means other than recourse to the dispatching service (R. 54-55). Local 357 informed the Company and Slater that it had no objection to the Company's direct hire of Slater as a *regular* employee if it so desired, the requirement of referral through the dispatching service applying only to casual employment (R. 52).

In practice, the dispatching service was not operated during the year of its existence so as to discriminate between union and nonunion job applicants; at the later hearing before the Board there was no claim or evidence that the Local 357 applied the dispatching service in a discriminatory fashion, the Board resting its decision on inferences drawn from the bare existence of the referral agreement (R. 56-57, 58).

B. The Proceedings Before the Board

Upon charges filed by Slater against the union and the Company, a hearing was held before a trial examiner. He recommended dismissal of the complaint on the ground that the referral agreement was valid and that there was no evidence of any unlawful discriminatory application of the agreement, either as to Slater in particular, or as to other job applicants generally (R. 47-61).

On appeal by the General Counsel to the Board, the Board reversed on the sole basis of the invalidity of the referral agreement on its face, and the Company's and the union's insistence that Slater be denied employment for failure to comply with its terms. The Board found that the agreement was invalid on its face in that it obligated the Company to hire casual employees exclusively through the dispatching service maintained by Local 357 (R. 37-38). It stated that (*ibid.*):

> Such an exclusive hiring agreement between an employer and a union, the Board has recently held, constitutes an inherent and unlawful encouragement of union membership *unless* the agreement explicitly provides that: (1) Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements; (2) The employer retains the right to reject any job applicant referred by the union; and (3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards deemed by the Board to be essential to the legality of an exclusive hiring agreement. None of these safeguards essential to the legality of an exclusive hiring arrangement is contained in the contract to which Respondents [Local 357 and the Company] are parties. Under all the circumstances, we conclude that the Respondent Com-

pany has violated Section 8(a)(3) and (1) of the Act, and the Respondent Union has violated Section 8(b)(2) and (1)(A) of the Act, by giving effect to the hiring provisions of their contract.

The Board rested this conclusion exclusively upon its recent decision in *Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883 (R. 38 and n. 1).[1] It stated in that case that: the "vice" of a system of employment based on dispatch from a hiring hall operated by a union "lies in the fact of unfettered union control over all hiring . . ." (*id.* at 896); in exercising this power "it is reasonable to infer that the Union will be guided in its concession by an eye towards winning compliance with a membership obligation or union fealty . . ." (*ibid.*); employees will therefore strive "to ingratiate themselves with the Union" (*id.* at 895), and hence "the inference of encouragement of union membership is inescapable" (*id.* at 896); accordingly, "the inherent and unlawful encouragement of union membership that stems from unfettered union control over the hiring process would be negated, and we would find an agreement to be nondiscriminatory on its face, only if the agreement explicitly provided" for the three requirements previously quoted (*id.* at 897).

The Board made no finding that Slater or any other job applicant had in any way been singled out for discriminatory treatment because of any lack of standing with the union, and it did not disagree with the trial examiner's findings that:

> . . . there is no evidence that he [Slater] was singled out and subjected to discriminatory treatment, and I

[1] In Mountain Pacific (199 NLRB at 894), the Board, as here, held the referral agreement unlawful on its face and without regard to any other evidence of discrimination, the Board stating as follows: "The basic question herein is whether the written contract, apart from all other evidence in the case, is itself unlawful because of the exclusive hiring-hall provisions it contains. We hold the hiring-hall provisions of this contract to be unlawful. For purposes of our decision, therefore, it is unnecessary to determine whether there is sufficient evidence apart from the contract to support the allegation of discriminatory practices in hiring."

can hardly conceive of any reason why he should have been. (R. 52) . . . no contention is made, and no evidence proffered by the General Counsel to show that the Union has in any way discriminated against non-union members in its application of the seniority provisions of the contract. (R. 56-57).

Member Murdock dissented in *Mountain Pacific* (*id.* at 887-891). He explained that: "For more than 7 years it has been well-established Board law, judicially approved in every circuit court of appeals in which the issue was raised, that an exclusive nondiscriminatory hiring hall is not *per se* unlawful" (*id.* at 887); the true rule is "that where the General Counsel had *proved* that an ostensible nondiscriminatory hiring hall was, *in fact*, *operated* as a closed shop or in an otherwise discriminatory manner, the *practice* was unlawful" (*id.* at 890-891); "in the instant case", on the contrary, "the majority *presumes* that the Union will administer an otherwise lawful contract in an unlawful manner. This presumption is made *conclusive* unless the contract includes objective criteria which will explain and justify the exclusive aspect of hiring hall referrals" (*id.* at 888-889); this "amounts to nothing more than a finding that an otherwise lawful contract is unlawful unless the parties agree to include words expressing their lawful motivation" (*id.* at 890).

The Board further concluded, based on its foundation finding that the requirement of referral for casual employment through the dispatching service was unlawful *per se*, that the Company's denial of casual employment to Slater, based on Local 357's request, except on proper referral, constituted a violation of Section 8(a)(3) and (1) of the Act by the Company and a violation of Section 8(b)(2) and (1)(A) by Local 357 (R. 39).

The Board entered an order against the Company and Local 357 requiring *inter alia* that (1) they cease giving effect to any agreement "which unlawfully conditions the hire of applicants for employment, or the retention of em-

ployees, upon referral or clearance" by a labor organization; (2) they jointly and severally reimburse Slater for any loss sustained by him by reason of the referral requirement; and (3) they jointly and severally reimburse all casual employees for any initiation fees and dues paid by them to Local 357 beginning with the period six months preceding the filing and service of the charge (R. 39-44).[1] In explanation of the requirement that the initiation fees and dues be reimbursed the Board stated that (R. 40):

> By the illegal hiring provisions of their contract, the Respondents have unlawfully encouraged employees to join the Respondent Union in order to obtain casual employment, thereby inevitably coercing those employees to pay union initiation fees and dues. It would not effectuate the policies of the Act to permit the retention of the payments of these union initiation fees and dues which have been unlawfully exacted from casual employees. As part of the remedy, therefore, we shall order the respondent jointly and severally to refund to the casual employees involved the initiation fees and dues paid by them as a price for their employment. This remedy of reimbursement is, we believe, appropriate and necessary to expunge the coercive effect of Respondents' unfair labor practices.

The Board directed such reimbursement in spite of the fact that there was no proof or even claim that any casual employee had in fact or in practice been coerced into joining the union and paying its fees pursuant to the referral system, or that he had involuntarily made his union contributions.

C. Proceeding Before the Court of Appeals

Local 357 thereafter petitioned the court below for review of the Board's Decision and Order; and on February 18, 1960, a majority of that court (Judges Wilbur K.

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[1] The requirement to reimburse Slater for loss of earnings and the casual employees for initiation fees and dues is tolled for the period that the intermediate report was outstanding, the examiner having dismissed the complaint (R. 40-41, and n. 5).

Miller and Danaher) in a per curiam decision which did not discuss the issues, affirmed the Board's decision and order except as to that portion of the order directing reimbursement of dues and fees paid to the union by all casual employees. Judge Edgerton, while concurring in the action of the majority in refusing to require such reimbursement of dues and fees, dissented from the majority's upholding of the Board's conclusion that the union's exclusive hiring hall or referral agreement violated the Act on its face. The basis for his dissent and for his conclusion that the Board's order should be set aside was as follows: Union hiring hall agreements or their equivalents have consistently been held to be legal under the Act absent evidence that the union in fact practiced discrimination thereunder. In this instant case not only was there no showing or attempt to show any discrimination in practice but the hiring hall or referral arrangement itself expressly negated discrimination in requiring that employment be obtained "only on a seniority basis," irrespective of whether the "employee is or is not a member of the union," so that the parties could not discriminate without violating the agreement. The fact that the referral agreement did not contain the provisions required by the Board in the *Mountain Pacific* case does not make it unlawful, Congress not being concerned with the substantive terms of collective agreements. Slater, being a member of the Union in good standing, his discharge, far from being discriminatory, was rather for his failure to comply with the terms of a valid agreement, and it is not the purpose of the Act to furnish statutory protection to contract breachers. (R. 71.)

SUMMARY OF ARGUMENT

A.

The dispatching service maintained by Local 357 is an example of what is commonly known as the union hiring hall. Hiring halls predominate in such important indus-

tries as maritime, stevedoring, and the building and construction trades, where employment is characteristically fluid and sporadic and the recruitment of a labor force by a particular employment is tailored to the requirement of a particular job. The confinement of the dispatching service in this case to the hire of *casual* employees identifies the element of the employment relationship which is ordinarily the reason for the operation of a hiring hall. It is designed to bring the worker and the job together by funneling both to a central point from which employment can be sought and obtained, regularized and shared, on an evenhanded basis. The union hiring hall is thus addressed to and solves a real economic need.

The referral agreement in the instant case is not and can in no way be declared invalid on its face; it can be performed according to its terms without effecting discrimination. Indeed, to follow its precise terms would ensure non-discriminatory hiring, and discriminatory hiring could result only if the terms of the agreement were breached. Seniority alone governs dispatch and is determined by industry service. And seniority commences on three months industry service "irrespective of whether such employee is or is not a member of the Union." Accordingly, not only does the agreement affirmatively establish that seniority is the controlling standard, but it also expressly negatives union membership or the lack of it as a factor in its determination.

The crux of the unfair labor practice prohibited by Section 8(a)(3) and (b)(2) is encouragement or discouragement of union membership by discrimination in employment. The operation of the dispatching service in accordance with the agreement entails no discrimination in employment. The dispatching service applies to all seeking casual employment, is open to all, and is open to all on the same terms. Nor is denial of casual employment to Slater except on proper referral discriminatory. This simply re-

quires Slater to perform his contractual obligation, the same as all other casual employees, to seek casual employment solely through the service. To require adherence to a collective bargaining agreement by the employees it covers is not discrimination in employment.

In the absence of discrimination in employment, it is irrelevant for the Board to assert that the operation of the dispatching service inherently encourages union membership. All benefits obtained by unions encourage membership, but only that encouragement which flows from discrimination in employment is prohibited. There was in this case no encouragement of union membership, purposeful or presumed, in any sense referrable to either the employee's status as a union member or his performance of the obligations of union membership.

Nor was there any violation of Section 8(a)(1) or (b)(1)(A) of the Act. These safeguard employees from abridgement of their "exercise of the rights guaranteed in Section 7," and the latter confers on employees the right to "refrain from" union or concerted activity. The only activity in this case in which the employees were required to engage, and from which Slater sought to "refrain," was to seek casual employment only through the dispatching service if they chose to seek it at all. This is an obligation imposed by contract. Section 7 of the Act confers no protected right upon an employee to refrain from complying with an agreement.

The Board's invalidation of the dispatching service rests exclusively on its presumption that the union will operate it discriminatorily. To indulge this presumption of illegal coduct is in fundamental conflict with the civilized premise that the "law will never presume that parties intend to violate its precepts. . . ." *Owings* v. *Hull*, 9 Pet. 607, 628. An illegal "purpose is not to be presumed. The presumption is the other way. To be established it

must be proved." *Mitchell* v. *United States*, 21 Wall. 350, 353. And in this case the proven facts do not permit but negative a conclusion that the dispatching service was actually discriminatorily operated or that the agreement contemplated any discrimination.

B.

The Board has created a presumption that a union will operate a referral system of employment discriminatorily and it has further held that there is no means of overcoming this presumption short of acquiesence in incorporating into the agreement the three requirements the Board decrees. But the Board is without power to require insertion of substantive terms into a collective bargaining agreement as its price for the valid establishment of a referral system. *NLRB* v. *American National Insurance Company*, 343 U.S. 395 at 404 and 409; and *Local 24 Teamsters Union* v. *Oliver*, 358 U.S. 283 at 295. "The Board has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice." *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93 at 108. And the three requirements formulated by the Board are in themselves objectionable: To grant the employer the right to reject any applicant referred by the union takes from the union the right to seek protection against rejection except for good cause; the requirement that the agreement explicity provide that selection of applicants shall be on a non-discriminatory basis takes from the contracting parties the right to determine whether they wish to add a contractual prohibition of unfair labor practices to the statutory obligation which already exists as a matter of law; and the requirement for posting of the hiring or referral agreement is one which can only be predicated on a prior finding of the commission of an unfair labor practice. *See Art Metals Construction Company* v.

NLRB, 110 F. 2d 148 at 147 (C.A. 2). The Board thus begins with the presumption of illegality, which it has no power to indulge, and proceeds to the requirement that certain provisions be inserted into the agrement in order to overcome the presumption, which it has no power to impose.

C.

Slater was a member of Local 357 in good standing. There was no showing that he was in default in the performance of any obligation of union membership. Accordingly, neither lack of union membership or default in the discharge of an obligation of union membership could be, and there is no claim, showing, or finding that these were the foundation for any action against Slater. On the contrary, the express finding is that the Company discontinued Slater's employment as a casual employee solely because he had obtained casual employment with it without recourse to the dispatching service, in compliance with Local 357's request not to employ him in that capacity except on proper referral. (R. 49-55). To have permitted Slater to retain his casual employment with the Company, secured by him in violation of the agreement, would have been to discriminate in his favor and against all the other employees who were fulfilling their contractual obligation to work through the dispatching service. Action by an employer and a union to secure an employee's adherence to the terms of an agreement is not and cannot be discrimination in employment. *N.L.R.B.* v. *Furriers Joint Council*, 224 F. 2d 78 (C.A. 2), affirming the views of the dissenting Board member and the examiner, 108 N.L.R.B. 1506, 1511, 1520-1522; *N.L.R.B.* v. *Rockaway News Supply Co.*, 345 U.S. 71, 80.

As stated by Judge Edgerton in his dissent below, "To interpret the Act as 'furnishing statutory protection to employees who choose to violate valid provisionsof labor-management contracts' would not be 'consistent with the

underlying purpose of the Act to promote . . . collective bargaining agreements. . . ." *NLRB* v. *Furriers Joint Council*, 224 F. 2d 78, 80 (2d Cir.)."

The Board's asseveration of encouragement of union membership also glosses over the fact that it is the employer's "purpose" to encourage which is "controlling." Specific proof of intent is unnecessary only in the sense that its existence is inferrable from the character and consequence of the conduct. The only relevant conduct disclosed in this case is the operation of a dispatching service not discriminatory either in its general or specific application. From these bare facts nothing is inferrable as to either the Company's or Local 357's purpose except that they sought to regularize casual employment and to require an employee who circumvented his contractual obligation to adhere to it. Especially is this so when it is remembered that the Company and Local 357 were operating under a master agreement negotiated by fifteen local unions and an association representing about one thousand employers. Surely an industry-wide purpose to engage in prohibited encouragement of union membership is not inferrable.

D.

A remaining issue in this case concerns the validity of the Board's order requiring the Company and Local No. 357 to reimburse all casual employees for union dues and initiation fees paid by them during the term of the alleged illegal referral agreement. Since the principal argument on this will be made by the petitioner in case No. 68 this term, which has been consolidated with the instant case, a summary only of the argument that such order is invalid and constitutes a punitive exercise of the Board's remedial authority not adapted to the situation requiring redress is set forth in Part II of this brief at page 50 to which the Court is respectfully referred.

ARGUMENT

I. It is not an unfair labor practice to incorporate a requirement in a collective bargaining agreement that casual employment shall be secured solely through a dispatching service maintained by the union and to enforce that requirement by denying casual employment to a worker except on proper referral.

On the merits the basic question in this case is whether a union may lawfully operate a dispatching service in accordance with a collective bargaining agreement providing that employers shall hire casual employees solely upon referral from the service unless workers are not available from that source, without incorporating into the agreement the three requirements that the Board decrees. To show that this question should be answered yes, we shall (1) analyze the terms of the agreement and describe the economic problem to which such agreements are addressed; (2) analyze the terms of the statute and consider the authoritative gloss which the precedents have given the statute; and (3) treat with the Board's presumption that the union will act discriminatorily and its inferences of illegality from the bare existence of the referral agreement, and its further assertion that this presumption and these inferences can only be overcome by explicit incorporation into the agreement of the three requirements formulated by it.

A. The Terms Of The Agreement Pertaining To The Dispatching Service.

The agreement provides that, where an employer operates within the territorial jurisdiction of a local union maintaining a dispatching service, an employer who desires to hire a casual employee "shall first call the Union or the dispatching hall designated by the Union for such help" (R. 63). Hirings of casual employees "from any other available source" is permissible if the dispatching service

notifies the employer that "such help is not available" through it, or if the employees dispatched "do not appear for work at the time designated by the employer" (R. 63).

Seniority governs dispatch. "Casual employees shall . . . be employed only on a seniority basis in the Industry whenever such senior employees are available"; "No casual employee shall be employed by any employer . . . in violation of seniority status if such employees are available . . ." (R. 62-63). Industry service determines the seniority of casual employees and union membership or the lack of it is expressly excluded as a criterion. "Seniority rating of such employees shall begin with a minimum of three months service in the Industry, irrespective of whether such employee is or is not a member of the Union" (R. 63). Seniority may be broken by discharge. "Discharge of any employee by any employer shall be grounds for removal of any employee from seniority status" (R. 63). Finally, "An available list with seniority status will be kept by the Unions, and employees requested will be dispatched upon call to any employer who is a party to this Agreement" (R. 62).

In short, hiring of casual employees is based on referral from the dispatching service. Seniority governs dispatch and is determined by industry service. And seniority commences on three months industry service "irrespective of whether such employee is or is not a member of the Union." Accordingly, not only does the agreement affirmatively establish that seniority is the controlling standard, but it also expressly negatives union membership or the lack of it as a factor in its determination.

B. The Economic Problem To Which Exclusive Referral Agreements Are Addressed.

The dispatching service maintained by Local 357 is an example of what is commonly known as the union hiring hall. Hiring halls predominate in such important industries

as maritime, stevedoring, and the building and construction trades, where employment is characteristically fluid and sporadic and the recruitment of a labor force by a particular employer is tailored to the requirement of a particular job. The confinement of the dispatching service in this case to the hire of *casual* employees identifies the element of the employment relationship which is ordinarily the reason for the operation of a hiring hall. It is designed to bring the worker and the job together by funneling both to a central point from which employment can be sought and obtained, regularized and shared, on an evenhanded basis.

It is common ground that the union hiring hall is addressed to and solves a real economic need. The Board in *Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883, 896, n. 8, stated that:

> It was to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers that the union hiring hall as an institution came into being. It has operated as a crossroads where the pool of employees converges in search of employment and the various employers' needs meet that confluence of job applicants.

On October 26, 1949, the construction employer representatives serving on the National Joint Board for the Settlement of Jurisdictional Disputes, appearing before the Senate Labor Subcommittee, made a full presentation concerning employment under union referral procedures and hiring practices in the construction industry in which they emphasized the salutary operation of such procedures and practices respecting both employers and employees within the industry and the vital function played by the construction unions in training and supplying skilled workers in a mobile industry. See hearings on S. 1973 before the Subcommittee on Labor and Labor-Management Relations of

the Senate Committee on Labor and Public Welfare, 82nd Cong., 1st Sess. 155 (1951).

Among other things, the construction employers there stated (id. at 158-9):

> *The selection of workmen because of their qualifications should not be construed as unfair discrimination*—The men are generally selected for their qualifications, not for the kind of card they carry, or the absence of one. If, however, the selection of a workman solely because he can furnish evidence of training, experience, skill, safety training, cooperation, permanent connection, and character references—in a given community by virtue of being a member of a given union which can vouch for these qualifications—in place of some workmen without substantiated evidence of such qualifications for the work to be performed, then the employer's choice must not be regarded as discrimination in favor of union membership and he must not be deprived of the right to use his own criteria in judging the qualifications. To do otherwise will destroy the production, quality, and efficiency of construction operations.
>
> The construction employer should not be deprived of his right to select his source of labor supply, just as he selects his source of the various materials without charges of discrimination unless it is shown that the intent was to discriminate for or against membership in a certain union.

The economic facts and the experience with respect to hiring halls in the maritime industry are set forth in J. P. Goldberg's "*The Maritime Story*," Harvard University Press, 1957, pp. 277-282.

The General Counsel of the Board during the process of this litigation below stated concerning the hiring hall in the maritime industry that:[3]

> . . . anyone familiar with the peculiar characteristics of maritime employment would agree that the recruit-

[3] Fenton, *Union Hiring Halls Under The Taft-Hartley Act*, 9 Lab. L. Jour. 503, 507 (1958); see also, Fenton, Address of June 27, 1958, 42 LRRM 101, 103.

ing of employees through hiring halls has vastly helped to avoid the graft, favoritism and indignities which in past years have attended job seeking in the industry, and that hiring halls have made possible a fair rotation of jobs and an even supply of labor in the best interests of seamen and shipowners alike.

And he further stated concerning the hiring hall in the building and construction industry that:

> The building and construction industry is another and perhaps more familiar example. Needless to say, that industry is in many ways unique. It fits into few of the orthodox categories of industry or employment with which the Board prior to 1947 had been accustomed to deal. In the first place the industry is mobile. Generally speaking, the work of the industry is performed on separate project sites rather than at fixed locations. Contractors bid on or otherwise obtain a construction job, make arrangements to place the necessary equipment on the site, and hire the skilled artisans and laborers they need for the particular job. Upon completion of the job, they move on to a new job site and repeat the process. Of necessity, then, workers in the industry are rarely attached to a single employer. In the course of a given work year, employees are employed by a number of different contractors on a number of different construction sites. Employment is thus temporary and intermittent in nature.
>
> This kind of employment relationship creates special problems both for the contractor and for the worker. The contractor, before he bids on or undertakes a project, must be apprised of such vitally relevant factors as the availability of a specialized labor force in the area where the project is to be performed and the cost of such a labor force. If he is a general contractor and will require one or more subcontractors to complete the job—as often as not a completion date for the project is fixed, and failure to meet that date invokes penalties—he also needs to have information relevant to their needs and costs. When he actually

[1] *Ibid.*

undertakes the job, it is imperative that the workmen he procures actually possess the skills which he requires. Without laboring the point too much, it is obvious that the contractor, who is frequently a stranger to the area involved, cannot fulfill his needs on the basis of approaching individual workmen. The nature of his operation is such that he requires some central source both for his information and for his employment needs.

The individual workman in the construction industry is likewise handicapped. Unlike his counterpart, the industrial employee, he has no fixed locations at which he can apply for work. Construction projects are scattered, often located in remote areas, and advance information as to their location and employment needs is not widespread. Moreover, the practicability of a search for employment under these admittedly adverse conditions is aggravated by the fact that the employment, when and if obtained, is likely to be for a short term. By the same token, the construction worker, because of the very nature of the industry, lacks the assurance which his industrial counterpart has, namely, that proficiency in the performance of the job which he obtains is at least a minimum guarantee of continued employment.

Union hiring halls and referral systems are an answer to these reciprocal needs of the contractor and the worker.

The Joint Committee on Labor-Management Relations described the stevedoring situation on the west coast waterfront before the establishment of hiring halls as follows (S. Rep. No. 986, Pt. 5, 80th Cong., 2d Sess., 36-37):

> As the shape-up operates, each pier where work is to be done constitutes a labor market of its own. All longshoremen in search of jobs line up outside that pier and wait for the stevedore foreman to come along, tell them to shape up in a semicircle around him, and select the particular workers he needs. Those not selected must go to another pier and try again or wait (out in the weather or in the nearest saloon) for the next shape.

Under the shape-up system, there are usually several times as many men attached to the labor force as there are full-time jobs available on an average working day. The intense coinpetition for employment resulting from this chronically glutted labor market leads to most vicious abuses, favoritism, discrimination, and downright bribery in hiring methods.*

> The States of New York and New Jersey hereby find and declare that the conditions under which waterfront labor is employed within the port of New York district are depressing and degrading to such labor, resulting from the lack of any systematic method of hiring, the lack of adequate information as to the availability of employment, corrupt hiring practices and the fact that persons conducting such hirings are frequently criminals and persons notoriously lacking in moral character and integrity and neither responsive or responsible to the employers nor to the uncovered will of the majority of the members of the labor organizations of the employees; that as a result waterfront laborers suffer from irregularity of employment, fear and insecurity, inadequate earnings, and unduly high accident rate, subjection to borrowing at usurious rates of interest, exploitation and extortion as the price of securing employment and a loss of respect for the law; that not only does there result a destruction of the dignity of an important segment of American labor, but a direct encouragement of crime which imposes a levy of greatly increased costs on food, fuel and other necessaries handled in and through the port of New York district.

Member Philip Ray Rodgers of the National Labor Relations Board stated in an address at the University of Washington on March 12, 1959 that:

> There is no question that in many industries the hiring hall or referral system performs a valuable function. This is especially so in industries where jobs are of relatively short duration and of changing location as in the building and construction industry. Properly operated, hiring halls provide a fair and efficient method of bringing employees together with jobs to fit their skills without the necessity of their making endless rounds of scattered employers' establishments. They also benefit employers by enabling them to recruit

* The employment of longshoremen on the New York-New Jersey piers through the shape-up, without a hiring hall led to the enactment of the New York-New Jersey Waterfront Commission Act (McKinney's New York Unconsolidated Laws, §6709; New Jersey Stat. Ann. §32:23; 67 Stat. 541; in 4 L. R. R. State Laws 12,277) in an effort to regularize waterfront employment. Section 1 Article I of the findings and declarations of that Act states that:

a labor force of the required skills quickly and efficiently.

And Member John H. Fanning similarly stated in an address before the American Society for Personnel Administration at Jacksonville, Florida on February 6, 1959 that: "the Board recognized that hiring halls in many areas of industry have been of great usefulness to employees and employers, assuring the former of a fair distribution of available employment and the latter of a standard of competence they could not otherwise readily secure."

C. The Validity Of The Dispatching Service Under The Express Provisions Of The Act.

With the illumination provided by the economic reason for being of hiring halls we turn to consider whether the dispatching service in this case, provided for and operated under the terms of the collective bargaining agreement, offends Section 8(a)(3) and (b)(2) 8(a)(1) or 8(b)(1)(A) of the Act as the Board found. It is immediately to be noted that the Act, both as enacted in 1947 and as amended in 1959, contains no language which expressly abolishes the union hiring hall or union job referral systems. Neither does the Act contain language establishing any conditions under which such halls or systems can be operated or which delegates to the Board any powers in these areas. Instead, the Board must rely upon the general language of Sections 8(b)(2) and the even more general language of Section 8(b)(1)(A) coupled with the language of Sections 8(a)(3) and (1).

Before and after these particular provisions were enacted Senator Taft made it entirely clear that Congress did not intend to invalidate union hiring halls or referral systems as such, but merely to outlaw certain discriminatory practices under them. He stated:

> "In order to make clear the real intention of Congress, it should be clearly stated that *the hiring hall is*

not necessarily illegal. The employer should be able to make a contract with the union as an employment agency. The union frequently is the best employment agency. The employer should be able to give notice of vacancies, and in the normal course of events to accept men sent to him by the hiring hall . . .

. . . . . .

"The majority report proceeds upon the erroneous assumption that . . . maritime unions cannot continue to have hiring halls . . . *The National Labor Relations Board and the courts did not find hiring halls as such illegal but merely certain practices under them. Neither the law nor these decisions forbid hiring halls, even hiring halls operated by the unions, so long as they are not so operated as to create a closed shop . . .*" S. Rept. 1827, 81st Cong. 2d Sess. pp. 13, 14. (Emphasis added).

The above statement was made after the enactment of the Taft Hartley Act. A statement to similar effect was made, however, by Senator Taft during the course of debate on this Act:

"As a matter of fact, most of the so-called closed shops in the United States are union shops; there are not very many closed shops. *It in a few rare cases the employer wants to use the union as an employment agency, he may do so.* But he cannot make a contract in advance that he will only take the men recommended by the union." (*2 Leg. Hist.* LMRA 1010) (Emphasis added).

It is further significant (See *NLRB* v. *Local 679* (Curtis Bros.) 362 U.S. 274) that for seven years following the enactment of Taft-Hartley in 1947 and until its decision in Mountain Pacific, the Board had steadfastly read the Act as not invalidating hiring halls or referral systems as such, but merely actual discriminatory practices carried on in their operation. See cases cited in dissent of member Murdock in the Mountain Pacific case, 119 NLRB at 887.

What in the above Sections in the Act relied upon by the Board now warrants its present conclusion that union

operated hiring halls or referral systems are invalid regardless of practices under them?

Section 8(b)(2) makes it an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(2). . . ." Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

The crux of the prohibition therefore is encouragement or discouragement of union membership by discrimination in employment. As the Supreme Court has explained (*Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 42-43):

> The language of 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed. . . .

And it is clear that "Congress intended the employer's purpose in discriminating to be controlling" (*id.* at 44), although "specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership" (*id.* at 45).

Turning to this case, the operation of the dispatching service in accordance with the terms of the agreement can be no violation because it entails no discrimination in employment. The dispatching service applies to all employees within the industry who seek casual employment from contracting employers. The same standard of seniority is uniformly applicable to all the employees. And that

standard is expressly made to operate evenhandedly "irrespective of whether such employee is or is not a member of the Union." Thus, the dispatching service applies to all seeking casual employment, is open to all, and is open to all on the same terms.

The operation of the dispatching service, not discriminatory in its general applicability, was not discriminatorily applied to Slater. He was a member of Local 357 in good standing. There was no showing that he was in default in the performance of any obligation of union membership. Accordingly, neither lack of union membership nor default in the discharge of an obligation of union membership could be, and there is no claim, showing, or finding that these were, the foundation for any action against Slater. On the contrary, the express finding is that the Company discontinued Slater's employment as a casual employee solely because he had obtained casual employment with it without recourse to the dispatching service, in compliance with Local 357's request not to employ him in that capacity except on proper referral. (R. 49-55). To have permitted Slater to retain his casual employment with the Company, secured by him in violation of the agreement, would have been to discriminate in his favor and against all the other employees who were fulfilling their contractual obligation to work through the dispatching service. Action by an employer and a union to secure an employee's adherence to the terms of an agreement is not and cannot be discrimination in employment. *N.L.R.B.* v. *Furriers Joint Council*, 224 F. 2d 78 (C.A. 2); affirming the views of the dissenting Board member and the examiner, 108 N.L.R.B. 1506, 1511, 1520-1522; *N.L.R.B.* v. *Rockaway News Supply Co.*, 345 U.S. 71, 80. And so, as the examiner concluded, "the employer's refusal, on demand of the Union, to continue to employ Slater as a casual employee unless and until he was dispatched to the job by the Union, constituted no violation of the Act on the part of either the Union or the Employer" (R. 49-50).

In the absence of discrimination in employment, it is irrelevant and unsound for the Board to insist, as it does, that the operation of the dispatching service inherently encourages union membership. So does the negotiation by a union of a substantial wage increase. So does a union's success in securing shorter hours, liberal retirement pensions, adequate severance pay, ample sick leave, and effective grievance adjustment. Are these too outlawed because they may encourage union membership?

The dispatching service is in the same class. It is an economic instrument valuable to the employers and employees in regularizing casual employment. A labor organization is a service institution, and whenever it does its job well, it encourages union membership. Necessarily, therefore, as the Supreme Court stated, only such encouragement or discouragement of union membership "as is accomplished by discrimination is prohibited" (*supra*, p. 20). There was no discrimination here.

The Board's asserveration of encouragement of union membership also glosses over the fact that it is the employer's "purpose" to encourage which is "controlling" (*supra*, p. 20). "[S]pecific proof of intent" is unnecessary only in the sense that its existence is inferrable from the character and consequence of the conduct. The only relevant conduct disclosed in this case is the operation of a dispatching service not discriminatory either in its general or specific application. From these bare facts nothing is inferrable as to either the Company's or Local 357's purpose except that they sought to regularize casual employment and to require an employee who circumvented his contractual obligation to adhere to it. Especially is this so when it is remembered that the Company and Local 357 were operating under a master agreement negotiated by fifteen local unions and an association representing about one thousand employers. Surely an industry-wide purpose

to engage in prohibited encouragement of union membership is not inferrable.

The difference between this case and the situations where intent may be presumed is evident from the three cases which were united in the single opinion in *Radio Officers*. In *Radio Officers* itself the union sought, contrary to the terms of the agreement, to require the hire of employees solely upon referral from the hiring hall; access to the hiring hall was restricted to union members in good standing; and the union placed a member in bad standing and declined to clear him for employment because of his failure to adhere to a membership rule (347 U.S. at 28-33). In *Teamsters*, an employee's seniority was reduced because of delinquency in his payment of union dues although no valid union security agreement was in effect authorizing compulsory dues payment (*id.* at 24-28). In *Gaynor*, the employer withheld wage and vacation benefits from nonmembers of a union, while granting these benefits to union members who, except for their membership status, were in the same position as the nonmembers (*id.* at 34-38). Thus, in each case, detriment to the employee was directly referable to union membership, an obligation of union membership, or both. In this case, on the other hand, the dispatching service is not based on either union membership or an obligation of union membership.

In short, there can be no violation of Section 8(a)(3) and (b)(2) in this case for two reasons: First, there was no discrimination in employment, which renders irrelevant any inquiry into encouragement of union membership; second, there was no encouragement of union membership, purposeful or presumed, in any sense referable to either the employee's status as a union member or his obligation of union membership.

We reach the question whether, apart from Section 8(a)(3) and (b)(2), there was a violation of Section 8(a)(1) and (b)(1)(A). The Board's finding of a violation of

the latter provisions is derived solely from its finding of a violation of the former and has no independent significance. The two fall together.

The Board argued below that, even if a violation of Section 8(a)(3) and (b)(2) is not established, a violation of Section 8(a)(1) and (b)(1)(A) is made out. This is an argument easily met. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7", and Section 8(b)(1)(A) makes it an unfair labor practice for a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7. . . ." Section 7 *inter alia* confers on employees the right to "refrain from" union or concerted activity. The only activity in this case in which the employees were required to engage, and from which Slater sought to "refrain", was to seek casual employment only through the dispatching service if they chose to seek it at all. This is an obligation imposed by contract. And it hardly needs to be labored that "employees lawfully bound by contract . . . [are] not free to violate the agreement under the guise of engaging in concerted activities for mutual aid or protection or of refraining from so doing, within the meaning of Section 7": "employees have no protected right under Section 7 to violate the valid provisions of a collective bargaining agreement." *N.L.R.B.* v. *Furriers Joint Council*, 224 F. 2d 78, 80 (C.A. 2), affirming the views of the dissenting Board member and the examiner, 108 NLRB 1506, 1511, 1520-1522; *N.L.R.B.* v. *Rockaway News Supply Co.*, 345 U.S. 71, 80. And see the examiner's discussion in this case (R. 49-51).

It is apparent that the Board, in using the broad language of Section 8(b)(1)(A) to outlaw union operation of a referral system, is utilizing the same device which this Court recently struck down in the Curtis case (*NLRB* v. *Local 639* decided 362 U.S. 274. It was there made clear that the general language of Section 8(b)(1)(A) cannot be used by

the Board as a makeweight for its shifting concepts of union unfair labor practices under the Act, and that more specific language must be pointed to. In respect to the hiring hall, we have seen that there is none; all that has been outlawed under the only specific language to which the Board can point, namely Section 8(a)(3) or 8(b)(2), is an actual act or practice of discrimination based on union membership or the lack of it, and that is not present in this case.

D. The Validity Of Dispatching Service or Hiring-Hall Arrangements as Determined in the Courts.

The authoritative gloss which the precedents have put on the Act prior to the Board's decisions in the instant case, and in *Mountain Pacific* confirms our analysis of the statutory terms and establishes the validity of the dispatching service in this case. That gloss can be put in a nutshell. It is lawful to establish by contract that a union shall exclusively refer employees for work, so long as referral is made upon a nondiscriminatory basis, an employee being neither denied referral nor granted preference based on union membership or the performance of the obligations of union membership.

A "referral system is not *per se* invalid" and its operation becomes invalid only "if the union applies it discriminatorily." *N.L.R.B. v. Philadelphia Iron Works, Inc.*, 211 F. 2d 937, 943 (C.A. 3). See also, *Eichleay Corp v. N.L.R.B.*, 206 F. 2d 799, 803 (C.A. 3). "The factor in a hiring hall arrangement which makes the device an unfair labor practice is the agreement to hire *only* union members referred to the employer." *Del E. Webb Construction Co. v. N.L.R.B.*, 196 F. 2d 841, 845 (C.A. 8). "The action of an employer in hiring workmen through a union by means of referrals from the union, is held not to violate the Act, absent evidence that the union unlawfully discriminated in

supplying the company with personnel." *N.L.R.B.* v. *F. H. McGraw and Co.*, 206 F. 2d 635, 641 (C.A. 6).

This position was elaborated by the Court of Appeals for the Ninth Circuit (*N.L.R.B.* v. *Swinerton & Walberg Co.*, 202 F. 2d 511, 514, cert. denied, 346 U.S. 814):

> An employer violates §8(a)(3) and (1) of the Act if he requires membership in a labor organization as a condition precedent to employment. *N.L.R.B.* v. *Cantrall*, 9 Cir., 1953, 201 F. 2d 853. The Board has contended that adoption of a system of union referral or clearance also violates the Act absent a "guarantee that the union does not discriminate against non-members in the issuance of referrals." We do not believe *National Union of Marine Cooks and Stewards*, 90 N.L.R.B. 1099 (1950), supports this view. Although it was there noted that the provisions of an applicable labor contract prohibited such discrimination, the Board did not indicate that a referral system was *per se* improper absent a "guarantee" of non-discrimination. Such a rule would in practical effect shift the burden of proof on the question of discrimination from the General Counsel of the Board to the respondent. The rule which we deem proper was recognized by the Board in *Hankin-Conkey Const. Co.*, 95 N.L.R.B. 433 (1951), where it was said an agreement that hiring of employees be done only through a particular union's office does not violate the Act "absent evidence that the union unlawfully discriminated in supplying the company with personnel." 95 N.L.R.B. at 435.

As the Court of Appeals for the First Circuit explained in *N.L.R.B.* v. *International Association of Heat and Frost Insulators*, 264 F. 2d 347, 350:

> It is not illegal for an employer to rely upon a union to provide it with employees. In some industries such as construction and shipping, where much of the work is necessarily of an intermittent nature and the employer's need for workers varies from day to day, a hiring hall or referral system has sprung up. Under this system the employer calls upon the union to supply him with the necessary workers. However, if this

system operates so as to discriminate against non-union workers and makes possible only the employment of union members, it is an unfair labor practice.

The above case was decided subsequent to the Board's decision in *Mountain Pacific* but the doctrine as such was not discussed or adverted to in the case. The validity of the doctrine itself was directly put to issue in five of the circuits courts to date. Two of the circuits — the Court below, which affirmed the doctrine without discussion, and the First Circuit upheld the Board, and the remaining three circuits have rejected the doctrine, holding that the Board was without warrant or power to declare exclusive hiring-hall procedures to be unlawfull per se or to impose its three conditions: rather, said these courts, the Board is required in each case to produce proof of actual discrimination in practice or operation. These cases are:

NLRB v. *E&B Brewing Company*, 276 F. 2d 594 (6th Circuit, April, 1960)

NLRB v. *Mountain Pacific Chapter*, 270 F. 2d 425, (9th Circuit, August, 1959)

Morrison-Knudson v. *NLRB*, 275 F. 2d 914, (2nd Circuit, March, 1960)

Morrison-Knudson v. *NLRB*, 276 F. 2d 63, (9th Circuit, March, 1960)

NLRB v. *New Syndicate*, 46 LRRM 2295, (2d Circuit, May, 1960)

NLRB v. *Local 176, Carpenters*, 276 F. 2d 583, (1st Circuit, March, 1960.)

The *Mountain Pacific Chapter* case above involved the Board's case in which the doctrine was first promulgated and the court had no hesitancy in saying "the hiring hall is legal and has always been held so." In the second case,

involving the doctrine to reach that circuit—*Morrison-Knudson, supra*—that Court elaborated as follows:

> "It is not illegal for an employer to rely upon a union to provide it with employees. In some industries such as construction and shipping, where much of the work is necessarily of an intermittent nature and the employer's need for workers varies from day to day, a hiring hall or referral system has sprung up. Under this system the employer calls upon the union to supply him with the necessary workers."

In short, the necessities which make the use of a hiring hall dispatch system a reasonable procedure were magnified in Alaska on these Morrison-Knudson jobs. Of course, if such a system, otherwise lawful, is operated in an unlawful manner so as to discriminate against nonunion workers, and so as to provide only the employment of union members, then the arrangement may become an unfair labor practice. "The factor in a hiring hall arrangement which makes the device an unfair labor practice is the agreement to hire *only* union members referred to the employer." *Del E. Webb Const. Co.* v. *National Labor Relations Bd.*, 8 cir., 196 F. 2d 841, 845.

The Board might suspect or surmise that the Union may have used its dispatch system to discriminate against nonunion men, or to compel or encourage applications for membership. But such speculations are no substitute for proof of improper use of the system—much less for proof of an understanding that dispatching should be conditioned on union membership.

Sixth Circuit in the *E & B Brewing* case above, characterized the Board's position as follows:

> "As we understand the Board's position, it is that its experience proves that its effort to pick off the sour fruit frequently appearing on the hiring hall tree has been ineffective and altogether frustrating, so now it proposes to chop down the whole tree whenever it is not propped up by the Board's three 'protective clauses'."

E. The Board's Invalidation Of The Dispatching Service Based On Its Presumption That The Union Will Operate It Discriminatorily.

In spite of court decisions then available to it which upheld the hiring hall, and in disregard of seven previous years of Board history upholding the hiring hall device, the Board nevertheless held that the provision here establishing the dispatching service is invalid on the face of the agreement. Its essential reasoning is set forth in its decision in *Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883 at 893-897 discussed infra. In essence, its reasoning is as follows: "The agreement vests in the union exclusive authority to refer employees for casual employment." Accordingly, (1) this exclusive union operation of the employment service "inherently" encourages union membership, job applicants being compelled to cater to the union if not to become outright members in order to ensure against nondiscriminatory treatment; and (2) by the very nature of the referral system "it is reasonable to infer" that the union will exercise its authority discriminatorily by denying referral to employees because of nonmembership or default in the performance of a membership obligation; this anticipated discrimination in employment in the operation of the dispatching service encourages union membership by inducing employees to join the union and adhere to its rules in order to avoid loss of work from incurrence of the union's displeasure.

We have already touched upon point (1) of the Board's reasoning that the exclusive referral system constitutes an "inherent" discrimination. (supra, p. 27). We have there noted that a union is basically a service institution and any service it well performs will "inherently" encourage union membership. Thus, effectiveness in accomplishing better conditions of employment through collective bargaining will encourage such membership, and, to mention a close paral-

lel, even more so will effectiveness in adjusting grievances through exclusive union representation; indeed, the mere element of exclusiveness in connection with grievance representation should on the Board's premise outlaw all such procedures. Further, on the exact same premise of exclusive avenue of employment, the Board should condemn, as an inherent discouragement of union membership, any practice in which the employer alone through his privately operated employment service or employment office hires all of his employees, particularly where the employer is known to be opposed to unions. In that situation, just as much as in the situation where the union is the exclusive source of employment, it can be said that there are factors inherently working to discourage union membership, yet it has never as much as been suggested that employers or even known anti-union employers be denied the right to hire their own work force without proof of actual discrimination. Finally, the Board forgets, in the instant case, that the contract itself expressly prohibits discrimination by stating that seniority in employment alone is the controlling factor without regard to union membership.

Thus, it is clear that the Board's conclusion of "inherent" encouragement of union membership could make sense only if it is assumed that the contract will be breached and if it be presumed that the union will in fact operate the hiring hall discriminatorily by preferring members and disadvantaging nonmembers. Of course, casual employment will be denied to employees who attempt to secure it without recourse to the dispatching service, but in the absence of an additional vitiating factor of actual discrimination, all that this demonstrates is that the employee must do what the contract requires, and the contract is between the employer and the lawful exclusive representative of all such employers' employees.

But it cannot constitute invidious discrimination to insist that an employee who wishes casual employment seek

it through the means that the contract provides. "A labor agreement is a code for the government of an industrial enterprise" (*Aeronautical Industrial Lodge* v. *Campbell*, 337 U.S. 521, 528), and freedom from discrimination does not free the employee from obedience to the code any more than it frees the citizen from obedience to the law. The statutory prohibition against discrimination in employment does not license industrial anarchy.

The Board, at least in its brief below, soughtly to bolster its "inherency" argument by insisting that under any exclusive union referral system, employees will "reasonably feel" that the union will discriminate against them.

This is reliance upon the presumption once removed. For the Board cannot subscribe to the reasonableness of the employee's belief without also endorsing the validity of the employee's appraisal upon which any such belief must rest. And to reasonably justify the belief the appraisal must be that the union will act discriminatorily. To condemn the union on the basis of an employee's belief, in the absence of an overt discriminatory act on the union's part, is to embrace with a vengeance the crime of imagining the king's death. For the union stands condemned not for what it did, or even for what it thought, but for what another thought. But, as Mr. Justice Jackson has said, "I know of no situation in which a citizen may incur civil or criminal liability or disability because a court infers an evil mental state where no act at all has occurred." *American Communications Asso.* v. *Douds*, 339 U.S. 382, 437. And, *a fortiori*, "We can indulge in no involved speculation as to petitioner's guilt by reason of the imaginations of others." Mr. Justice Brennan in *In re Sawyer*, 360 U.S. 622, 635.

Turning now to the Board's point (2) above, it is clear from the Board's reasoning thereunder and the foregoing discussion, that the Board's invalidation of the dispatching service must necessarily rest exclusively on its presumption that the union will operate it discriminatorily.

To indulge this presumption of illegal conduct is in fundamental conflict with the civilized premise that the "law will never presume that parties intend to violate its precepts. . . ." *Owings* v. *Hull*, 9 Pet. 607, 628. An illegal "purpose is not to be presumed. The presumption is the other way. To be established it must be proved." *Mitchell* v. *United States*, 21 Wall. 350, 353. What the Supreme Court said of interstate carriers applies with equal force to labor organizations (*Cin., N.O., & T.P. Ry. Co.* v. *Rankin*, 241 U.S. 319, 327):

> It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and, in respect of transactions in the ordinary course of business, it is entitled to the presumption of right conduct. The law "presumes that every man, in his private and official character, does his duty, until the contrary is proved, it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et solemniter esse acta, donec probetur in contrarium*."

In short, "A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts." *Cin., P.B.S. & P.P. Co.* v. *Bay*, 200 U.S. 179, 184. The established facts in this case do not permit but negative a conclusion that unlawful results were contemplated. On the face of the agreement seniority governs the operation of the dispatching service and seniority is to be determined "irrespective of whether such employee is or is not a member of the Union." There is no claim or evidence that Local 357 applied the dispatching service in a discriminatory fashion for the more than one year it had been in operation (R. 56-57, 58). The single incident established in the record of specific application of the service shows that an employee who circumvented the service

was required to adhere to his contra[illegible] obligation of securing casual employment throug[illegible]nd there is nothing to show that the dispatching servi[illegible] was not established by the parties to realize its plain economic purpose of regularizing casual employment, of providing the employers with an efficient means of hiring casual labor, and of assuring the employees of a fair, evenhanded, and dignified means of securing casual employment.

And it will not do for the Board to say that other parties have operated other referral systems discriminatorily. We "do not think the evidence of what other people intended by other contracts of a similar character, however numerous, is sufficient of itself to prove that the parties to these contracts intended to violate the law or to justify . . . making such a presumption." *Bountiful v. Smith*, 108 U.S. 269, 276. The Board asserts, and it is therefore its burden to establish (*Claus v. Jamieson*, 182 U.S. 461, 488-491), the invalidity on its face of this contract between these parties. "'The burden of showing illegality is upon the party asserting it and it is not sufficient merely to create confusion and suggests doubts as to its legality.'" *Palmer v. Chamberlin*, 191 F. 2d 532, 539 (C.A. 5). "'Such a contract being illegal is not to be presumed: it must be established in evidence.'" *Thorton v. Bank of Washington*, 3 Pet. 36, 42. "There being no evidence to the contrary, we must adopt the assumption of ordinary life and of law that the trustees . . . acted lawfully. . . .". *Korkla v. Springfield Institution For Savings*, 245 U.S. 330, 336. "It is not to be presumed the parties intended to make a contract which the law does not allow" (*Bank of Kentucky v. Adams Express Co.*, 93 U.S. 174, 181), and "an illegal intent accompanying the performance of a perfectly legal act cannot be presumed" (*Claus v. Jamieson*, 182 U.S. 461, 490).

It may be that the Board, as a body of experts, has authority to draw reasonable inferences, presumably informed by its specialized experience, from the "evidential

facts." *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 48-50. But there must be evidential facts from which to draw the inference. There are none here. An inference cannot be drawn from the air. Particularly the Board cannot say, in defiance of every tenet of civilized jurisprudence, that "it is reasonable to infer" that the contracting union will act discriminatorily. *Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883, 896 "Commission expertise alone cannot support [such] pivotal assumption[s]." *Harrell* v. *F.C.C.*, 267 F. 2d 629. And especially is this so when the assumption is that a person will violate the law.

And the Board's power to draw inferences and to exercise its "expertise" is now more narrow than that permitted by this Court in such decisions as *Republic Aviation* v. *NLRB*, 324 U.S. 793 and *American Company* v. *NLRB*, 324 U.S. 793. This is by reason of the change made by Congress in Sections 10 (e) and 10 (e) of the Act when it enacted the 1947 Taft-Hartley amendments. The legislative history underlying the change in Section 10 (e) from "all the testimony" to "the preponderance of the testimony" and in 10 (e) from "evidence" to "substantial evidence on the record considered as a whole" plainly indicated the Congressional intent to require the Board to support its findings and conclusions by facts rather than inferences, and by evidence rather than by expertise.

H. Conf. Rept. No. 510 on H.R. 3020, 80th Cong. 1st Sess. at pp. 55-56 states:

> "In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and fact (*NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111; *NLRB* v. *Packard Motor Car Co.*, decided March 10, 1947), or when they rested only on inferences that were not, in turn, supported by facts in the record (*Republic Avia-*

tion v. *NLRB*, 324 U.S. 793; *Le Tourneau Company* v. *NLRB*, 324 U.S. 793).

". . . presumed expertness on the part of the Board in its field can no longer be a factor in the Board's decisions: . . .

"(T)he courts . . . will be under a duty to see that the Board observes the provisions of the earlier sections [10 (b) and 10 (c)] and that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reason for disregarding or discrediting the evidence that is in conflict with its findings. The language also precludes the substitution of expertness for evidence in making decisions. It is believed that the provisions of the conference agreement relating to the court's reviewing power will be adequate to preclude such decisions as those in . . . [the] *Republic Aviation* and *Le Tourneau*, etc. cases . . . without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into section 10 (e) of the amended act."

A final vice of the Board's position of per se of legality is that it relieves the General Counsel of his burden of proof under Section 10 of the Act. (*NLRB* v. *D. Gottlieb and Co.*, 208 F. 2d 682, C.A. 7 (1953); *NLRB* v. *Miami Coca Cola Bottling Co.*, 222 F. 2d 341, C.A. 5 (1955); *NLRB* v. *West Point Manufacturing Co.*, 245 F. 2d 783, C.A. 5 (1957). This burden of proof never shifts. (*NLRB* v. *Winter Garden Citrus Products*, 260 F. 2d 913, C.A. 5 (1958). The "burden to make out a case of discrimination rests continuously on, and does not shift from, Board to Respondent." *N.L.R.B.* v. *Brady Aviation Corp.*, 224 F. 2d 23, 25 (C.A. 5). See also, *Local No. 3, United Packinghouse Workers of America* v. *N.L.R.B.*, 210 F. 2d 325, 329 (C.A. 8), cert. denied, 348 U.S. 822; *Interlake Iron Corp.* v. *N.L.R.B.*, 131 F. 2d 129, 134 (C.A. 7).

Even the fact that an arrangement has an inherent capacity for discriminatory application and is administered by a party with strong bias in the matter does not shift the burden of proof. (*Interlake Iron Corp.* v. *NLRB*, 131 F. 2d, 129 (C.A. 7). This fundamental requirement with respect to the burden of proof would, as was specifically ruled in *NLRB* v. *Swinerton*, 202 F. 2d 511 (C.A. 9), be disregarded by the rule promulgated by the Board.

F. The Three Requirements Which The Board States Must Be Incorporated In An Agreement In Order To Validate A Hiring Hall.

The logic of the Board's position would require it to conclude that a hiring hall can never be validly established. The Board quivered on the brink of this conclusion but withdrew. It stated instead that (*Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883, 897).

> "We believe, however, that the inherent and unlawful encouragement of union membership that stems from unfettered union control over the hiring process would be negated, and we would find an agreement to be nondiscriminatory on its face only if the agreement explicitly provided that:
>
> (1) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.
>
> (2) The employer retains the right to reject any job applicant referred by the union.
>
> (3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement."

And the Board later stated that, to validate a referral system, the "three criteria" laid down must be "met *fully* and *in toto*" in order to "save such an exclusive arrangement from the interdiction of the Act." An agreement which does "not meet all of the criteria required . . . is *ipso facto* invalid and in violation of the Act." *K. M. & M. Construction Co.*, 120 NLRB No. 140.[*]

The vice of the Board's position thus cuts deeper than even indulging a presumption of illegal conduct and shifting the burden of proof. It is not simply a question of placing the risk of non-persuasion upon the accused rather than the accuser. For there is no means of persuading the Board of the licit purpose of the contracting employer and union short of acquiescence in incorporation into the agreement of the three requirements the Board decrees. As we now show, the Board is without power to require insertion of substantive terms into a collective bargaining agreement as its price for the valid establishment of a referral system of employment.

"The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Local 24, Teamsters Union* v. *Oliver*, 358 U.S. 283, 295. In the achievement of this goal "the Board may not, directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective

[*] The Board in its brief below argued that there is no need to inquire into the validity of the foregoing "three criteria" or its power to prescribe them for the reason that there is no compulsion to accept them and the parties need not maintain any particular kind of hiring system. Since the alternative to complying with the requirements is to relinquish the operation of a hiring hall, it seems obvious that the Board cannot impose "a choice between the rock and the whirlpool" without establishing its power to act at all and the validity of what it does do. Frost v. Railroad Commission, 271 U.S. 583, 593.

bargaining agreements." *N.L.R.B.* v. *American National Ins. Co.*, 343 U.S. 395, 404. What an agreement should contain "is an issue for determination across the bargaining table, not by the Board" (*id.* at 409); the parties "are to work out their agreement themselves" (*Local 24, Teamsters Union* v. *Oliver, supra*).

For the Board to say that parties who desire to establish a referral system of employment must contract for it on its terms or not at all is thus in fundamental conflict with the scheme of the Act. The Board "has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice" (*Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 108), and it *a fortiori* has no power effectively to compel additions to the agreement regardless of any element of an unfair labor practice. The vice in the Board's position is thus twofold. It strikes down the contractually established dispatching service as invalid on its face although there is no element of an unfair labor practice in it except that which the Board draws from its presumption of unlawful conduct. It then confronts the parties with the choice between foregoing a referral system or acquiescing in the Board's formulation of it although the Board is without power to require incorporation of substantive terms into an agreement. The Board thus begins with a presumption of illegality, which it has no power to indulge, and proceeds to a requirement that certain provisions be inserted into the agreement in order to overcome the presumption, which it has no power to impose.

[redacted]. The Board states that the agreement must "explicitly" provide that "The employer retains the right to reject any job applicant referred by the union." This requirement is objectionable in three respects:

(a) This requirement takes from the employer and the union the right to agree that a job applicant referred by

the union shall not be rejected except for good cause. In a question and answer guide to explain the application of *Mountain Pacific* the General Counsel of the Board stated unequivocally that this was his interpretation (5 CCH Lab. Law Rep. ¶50,087, p. 50, 269, question 15(f)):

> Question 15(f): One of the criteria set forth in *Mountain Pacific* is that the employer is given the right to reject a worker sent from the non-discriminatory list. Assuming that the union is operating the list in a non-discriminatory manner, may the union and contractors agree that workers will *not* be rejected, save for a good cause, i.e., lack of qualifications, ability, etc.? Assuming that the answer is "yes" could the union and contractors agree to refer a dispute over what constitutes "good cause" to the grievance procedure? * * *
>
> Comment: By the express terms of *Mountain Pacific* the contract between an employer and union who are party to an exclusive hiring arrangement must provide, among other "safeguards," that the "employer retains the right to reject *any* job applicant referred by the union" (emphasis supplied). In the light of the unqualified language in which this criterion is phrased it would seem that the right of rejection contemplated thereby is an unconditional one, in no way limited, for example, by considerations of "good cause" such as Question 15(f) suggests. This conclusion appears supported, moreover, by the fact that this "safeguard" was clearly viewed by the Board as one wholly separate and apart from the requirement that the parties must further agree to post not only this but also those provisions of the contract establishing objective standards to be followed by the union in referring applicants for employment. Since such objective referral standards would themselves be based on the same factors which, as stated in Question 15(f), would constitute "good cause," i.e., the applicant's "qualifications, ability etc.," a right of rejection limited to "good cause" would provide no additional "safeguard" and accordingly would not constitute a separate criterion such as would appear to be required by the *Mountain Pacific* decision. * * *

This graphically illustrates the Board's deep inroad into a subject which under the statute the parties are free to decide for themselves. Collective bargaining agreements almost universally safeguard employees from discharge or discipline except for good cause.[1] It is a short step from this safeguard to contractual protection against arbitrary rejection of referred employees. Under the statute the decision whether or not to take this step is for the parties to make, not the Board.

The point deserves emphasis. It is undisputed that the employer and union may provide that the basis for referral shall be such non-discriminatory standards as seniority, length of previous unemployment, qualifications for the work, and the like. But, says the Board, the employer must retain the right to reject any referred applicant. This means that if the union dispatches an employee it regards as competent, but the employer rejects him as incompetent, the employer must have the final say, with no leave even to adjust the dispute through the grievance and arbitration processes. And the same would be true of a dispute over seniority, length of unemployment, or any other objective criterion for dispatch. This is wholesale interference with free and private collective bargaining.

(b) The Board deprives the parties of their power of decision without any justification for this action even on the Board's analysis of the supposed mischief inherent in the referral system of employment. According to the Board the mischief lies in the union's presumed discriminatory denial of referral to employees who are nonmembers or who are in default in the performance of a membership obligation. But this supposed mischief is not to any degree overcome by empowering the employer to reject an employee who has been referred. The discrimination, if any,

[1] *Basic Patterns in Union Contracts*, 40-1 (Bur. Nat'l. Aff., 4th ed. Oct. 1957); Bull. No. 908-5, *Collective Bargaining Provisions, Discharge, Discipline and Quits*, U.S. Dep't. Lab., Bur. Lab. Stat. (1948).

takes place upon the denial of referral. An employee who has been referred, and who is therefore the only one the employer can reject, cannot have been discriminated against. It hardly safeguards an employee from discriminatory denial of referral to deprive the union of the opportunity to bargain with and secure from the employer a provision protecting the referred employee from arbitrary rejection . . .

(c) In fact, in this case, the employers in practice appear to have and exercise the authority to reject a referred employee deemed unsatisfactory (R. 34-35). The agreement does not negative this authority. It provides that the employers may "discharge any employee for services not deemed by the employer to be satisfactory," subject to a procedure by which the "Union . . . may protest any discharge believed by the Union to be unjustified" (R. 63-64). This procedure is unavailable to a referred employee who has been rejected, because he cannot be said to have been discharged before he has been hired. In practical effect, therefore, the requirement upon which the Board insists does in fact exist. We must accordingly conclude that, for the Board, a fact does not exist unless it is acknowledged in the very words which the Board dictates. It is not the role of the Board to cross the "t's" and dot the "i's" for employers and unions engaged in collective bargaining.

2. The Board also requires that the agreement shall "explicitly" provide that "Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements" (*supra*, p. [illegible]).

This requirement elaborates the statutory prohibition against discrimination and compels its incorporation into the agreement. Very often parties to collective bargaining

agreements do include in their compacts contractual interdiction of conduct which is also proscribed by the Act. For example, the agreement in this case provides that "No employee shall be discharged or discriminated against because of his membership in the Union or Union activities" (R. 63).

The consequence of contractual prohibition of unfair labor practices is to make the statutory obligation enforceable as a contract violation. It is for the contracting parties to decide whether they wish to undertake the burdens and to enjoy the advantages of this mode. Certain it is that it is not the function of the Board to make that choice for them. Yet that is precisely the effect of the Board's requirement that the statutory prohibition of discrimination be incorporated into the agreement.

Nor is it at all apparent how, on the Board's theory, it serves any purpose to include this provision in the agreement. A person who, on the Board's presumption, will violate the statute, will, on the basis of the same presumption, just as readily violate the contract. One does not expect truth by exacting an oath from a perjurer.

3. The third requirement which the Board states must "explicitly" be incorporated in the agreement is that "The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions pertaining to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement" (*supra*, p. [illegible]).

The Board is empowered, based on a finding that a person has engaged in an unfair labor practice, to require that person to post notices stating he will not engage in such conduct (*International Brotherhood of Teamsters,*

Union Contract Clauses, Commerce Clearing House, ¶51, 601, ¶1954 ... *Some Patterns in Union Contracts*, 65-57 (Bur. Nat'l. Aff., 4th ed. 0815 1957)

Local No. 554 v. *N.L.R.B.*, 262 F. 2d 456, 463-464 (C.A.D.C.), except if the wrong found suggests no need for posting (*N.L.R.B.* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 226). But the essential precondition to the exercise by the Board of any power to require a person to post notices is a finding that the person has committed an unfair labor practice and an order based on that finding. See *Art Metals Const. Co.* v. *N.L.R.B.*, 110 F. 2d 148, 151 (C.A. 2). The Board has no power to require the posting of notices as a precondition to the valid establishment by contract of a referral system of employment.

The observations of board member Murdock dissenting in Mountain Pacific (119 NLRB at 889) in respect to the Board's requirement of the "three criteria" are illuminating. He said: "If a hiring hall results in unlawful discrimination because, as the majority finds, the union is arbitrary master and is contractually guaranteed to remain so, I fail to see how the inclusion of objective criteria in the contract can remove the element of discrimination or the encouragement of union membership. Under any circumstances the employer would have surrendered all hiring authority and the union would be free under the contract to refer or not to refer applicants regardless of any expressed objective criteria. I am as much concerned as is the majority that purported nondiscriminatory hiring halls be nondiscriminatory in fact. But I do not believe that this Board has the power to hold, on the one hand, that such conduct by a union and an employer is lawful, but on the other hand, that it is unlawful unless the contract contains words indicating an intention by the union to administer the contract lawfully. This is as much as to say that an employer violates Section 8 (a) (3) of the Act merely by discharging a union member unless at the same time he states that the discharge is for economic reasons. My understanding of the law is that the General Counsel must prove by a preponderance of the testimony that the discharge was intended to encourage or discourage union membership.

Absent such proof, no unfair labor practice has been committed whether or not economic reasons were assigned by the employer for the discharge at the time it occurred. My view of the law in this respect is so well settled that it needs no citation of authority. In my opinion, the majority's novel approach to the hiring-hall issue amounts to nothing more than a finding that an otherwise lawful contract is unlawful unless the parties agree to include words expressing their lawful motivation. To my knowledge this is the first time that the Board or any court has found an unfair labor practice solely on the ground that the respondent failed to express a lawful motivation at the time the alleged unfair labor practice occurred."

G. The Board Has Attempted to Legislate

What a majority of the Board has attempted to do in this case and in *Mountain Pacific* is to incorporate their views as to what the law ought to be and disregard what the law actually states. But the Board cannot assume "a roving commission to inquire into evils and upon discovery correct them". *Schechter Poultry Corp.* v. *U.S.*, 295 U.S. 495, 551. It is for the Congress and not for the Board to establish policy. "That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act. The Board cannot ignore the plain provisions of a valid contract made in accordance with the letter and the spirit of the statute and reform it to conform to the Board's idea of correct policy. To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress." *Colgate-Palmolive Peet Company* v. *NLRB*, 338 U.S. 355 at 363. See also *Miller* v. *U.S.*, 294 U.S. 435 (1935) and *Work* v. *Mosier*, 261 U.S. 352 (1923).

It is no part of the function of the Board to be "a super Congress". *NLRB* v. *National Maritime Union*, 175 F. 2d.

686, 691 (C.A. 2) cert. denied 338 U.S. 954. If, in "a matter of such bitter controversy as the Taft-Hartley Act, the product of careful legislative drafting and compromise beyond which its protagonists either way could not force the main body of legislators, the courts should proceed cautiously" (*Raboin* v. *NLRB*, 195 F. 2d 906, 912 (C.A. 2), the Board should proceed with equal caution.

The Board's conclusion that the referral agreement in this case was unlawful on its face is not sanctioned by the Act and is contrary to applicable principles of law. The decision of the court below affirming the Board's holding should be reversed.

II. The Board's order requiring the Company and Local 357 jointly and severally to reimburse the casual employees for the union dues and initiation fees they paid is a punitive exercise of the Board's remedial authority not adapted to the situation requiring redress.

By arrangement with counsel, the full exposition of the legal principles and other considerations which have moved the court below as well as all other circuit courts of appeal that have considered the question, other than the Seventh, to hold that the Board's reimbursement order under its so-called Brown-Olds Doctrine (*Brown-Olds Plumbing and Heating Corp.*, 115 NLRB 594) is invalid under the Act will be set forth by petitioner in case No. 6 this term which has been consolidated with the instant cases for presentation and argument. To avoid reiteration, the petitioner's position respecting the validity of the refund order in the instant case can be summarized as follows:

The refund order is based on an attenuated series of inferences: the Board presumes the union will operate the referral system discriminatorily; from this it infers that employees join the union in order to escape discrimination;

it next asserts that, since the act of joining the union was induced by fear of discrimination, payment of dues and fees was the product of illegal inducement; and it concludes that the dues and fees should therefore be refunded.

The argument is fallacious on numerous grounds:

The Board must assume that the casual employees joined the union *after* the institution of the dispatching service. For if the employees joined the union *before* the operation of the dispatching service began, there is no basis for the Board's assumption that the employees joined in order to protect their employment from discriminatory denial of referral. Membership which preceded the dispatching service could not have been caused by it. The Board assumes this critical fact—that membership followed rather than preceded the dispatching service—without an iota of evidence to support the assumption; for all the Board can know a large percentage of the employees, whose dues and fees have been ordered reimbursed to them, joined when there was no dispatching service in effect.

But even if it could be assumed that every member joined subsequent to the time when the referral service was in operation, nevertheless, the reimbursement order must fall.

The fundamental vice in the Board's position lies in its basic assumption, made in disregard of the whole history of the growth of the labor movement, that the employees had no important incentive to join Local 357 or any other union operating a hiring hall except to escape presumed discriminations against them. But labor unions "were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. * * * Union was essential to give laborers opportunity to deal on equality with their employer." *American Steel Founders* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209. There is no evidence in the record in this case to support an assumption that the union membership of the casual em-

ployees was not part of this main stream. It "is left to mere conjecture to what extent membership . . . was induced by any illegal conduct. . . . To say that of the . . . [casual employees] who did join there were not those who joined voluntarily . . . would be to indulge an extravagant and unwarranted assumption." *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 238.

It is uncontested that Local 357 is the free choice of a majority of the employees to represent them in collective bargaining. Experience has demonstrated overwhelmingly that employees who choose to be represented by a union in collective bargaining also choose to pay union dues and fees to it. There is nothing in this record to warrant any different assumption by the Board in this case. Thus, there is no showing or no attempt by the Board to show that any one of the many hundreds of employees to whom repayments of dues and fees has been ordered had joined their union involuntarily or under coercion, let alone that the existence of the referral agreement had induced or even motivated them to become union members. Lacking a causal relationship between the alleged wrongful activity and damages allegingly caused by the activity, the Board, in ordering reimbursement on a blanket basis, proceeds punitively and without regard for the law. See *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7 at 10.

Employees voluntarily pay fees and dues because they know they cannot have the benefits of union representation without contributing to its cost. To require the reimbursement of dues and fees means that the casual employees will have received the benefits without sharing in paying the price. But it does not mean simply that. The moneys for reimbursement must come from somewhere, and insofar as Local 357 is concerned, they must come from the fees and dues paid by the *regular* employees to whom the refund order does not apply. It serves no policy of the Act to have the *regular* employees pay for

the benefits secured equally by the *casual* employees. Nor does it serve any policy to drain a union's treasury and thus impair its capacity to fulfill its intraunion programs such as death, disability, insurance, and vacation benefits. Nor is it any answer to say that the Board's reimbursement order would have a deterring effect. "That argument proves too much, for if such a deterring effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 12.

CONCLUSION

The decision below insofar as it sustains the Board's conclusion that petitioner committed an unfair labor practice in maintaining its referral or dispatching service should be reversed, and for the reasons stated above, the Board's order should be set aside in its entirety.

Respectfully submitted,

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